Nos. 21,869 and 21,870

United States Court of Appeals

For the Ninth Circuit

VALLEY VISION, INC.,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,
Respondents.

On Petitions to Review Decision and Orders of the Federal Communications Commission

BRIEF FOR PETITIONER

LAUREN A. COLBY,
GENNARO D. CALIENDO,
1334 G Street, N.W.,
Washington, D.C. 20005,
Counsel for Petitioner Valley Vision, Inc.

Of Counsel:
HALLEY, HEAD, LAFORCE & MOORAD,
1419 K Street,
Modesto, California 95353,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Jurisdictional statement 1

Statement of the case 4

Assignments of error 8

Summary of argument 10

Argument 14

I

The Federal Communications Commission possesses no statutory authority to regulate or otherwise interfere with community antenna television systems 14

A. The Commission's assumption of jurisdiction in the second report and order is totally inconsistent with prior Commission views on the very identical question 15

B. The sections of the act relied upon by the Commission do not confer jurisdiction to regulate CATV and were never intended by Congress to do so 21

C. The Commission does not possess any authority to make rules regulating the operation of CATV systems 26

II

The Federal Communications Commission possesses no statutory authority to issue cease and desist orders against persons who are non-licensees of the Commission 29

III

Assuming that the Commission does have authority to regulate CATV systems and does have authority to issue cease and desist orders against non-licensees, the Commission's action in ordering petitioner to cease and desist from the carriage of certain signals on its CATV system was arbitrary, capricious, and denied petitioner procedural due process 37

Conclusion 42

Appendix 1

Supplement 14

Table of Authorities Cited

Cases

Alaska Airlines v. CAB, 103 U.S. App. D.C. 225, 257 F. 2d 229 (1958) 14

CAB v. Delta Airlines, 367 US 316 (1947) 14

California Citizens Band Association v. United States, 375 F. 2d 43 (9th Cir. 1967) 28

C. J. Community Services, Inc. v. FCC, 246 F. 2d 660 (U.S. App. D.S. 1957) 34

Melody Music v. FCC, 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965) 21

Philadelphia Television Broadcasting Co. v. FCC, 359 F. 2d 282 (U.S. App. D.C. 1966) 25

Regents of Georgia v. Carroll, 338 U.S. 568, 94 L. Ed. 363 (1950) 26, 27

Southwestern Cable Co. v. U.S.A. and F.C.C., 378 F. 2d 118 (9th Cir. 1967) 5, 28

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 40

Yankee Network Inc. v. FCC, 107 F. 2d 212 (U.S. App. D.C. 1939) 28

Administrative Decisions

C. J. Community Services, Inc., 13 Pike and Fischer, R.R. 1 (1956) 34

In the Matter of Inquiry into the Impact of Community Antenna Systems, etc., 26 FCC 403 15

National Plastik-Ware Fashions, 9 Pike and Fischer, R.R. 982 (1953) 34

Prime Incorporated, 12 Pike and Fischer, R.R. 309 (1955) .. 34

Pages

Second Report and Order in Docket Nos. 14895, 15791, 31 Fed. Reg. 4540; 6 Pike and Fischer, R.R. 2d 1717 ..... 5, 21, 26

Statutes

Communications Act of 1934:
As amended, 66 Stat. 718 (1952), 47 U.S.C.A., Section 402(a) (1962) 1
Section 1 ..... 14, 21

Title I—"General Provisions":
Section 2 21
Section 3 21
Section 3(a) 24, 25
Section 3(b) 24, 25
Section 4(i) 26, 27

Title III:
Section 301 25
Section 303(f) 26
Section 303(h) 26
Section 303(r) 26
Section 307 25
Section 312 ..... 29, 39
Section 312(b) 29, 31
Section 312(c) 13
Section 402(a) 1, 2, 3
Section 402(b) 35

Judicial Review Act of 1950:
64 Stat. 1129, 1130 (1950), 5 U.S.C.A., Sections 1032, 1033 (Supp. 1961) 1, 2

Rules and Regulations of the Federal Communications Commission:
Section 1.263 41
Section 73.684(f) 42
Section 74.1105 37
Section 74.1107 37
Section 74.1110(i) 5

Other Authorities

Pages

31 Fed. Reg. 4540, 6 Pike and Fischer, R.R. 2d 1717 (1966) 15

S.R. No. 781, 73d Cong., 2d Sess. (1934) 1 Pike and Fischer, R.R. 10:221, 10:222 23

H.Rep. No. 1850, 73d Cong., 2d Sess. (1934) 1 Pike and Fischer, R.R. 10:243-10:244 24

S.R. No. 44, 82d Cong., 1st Sess. (1951) 1 Pike and Fischer, R.R. 10:282 31

H.Rep. No. 2426, 82d Cong., 2d Sess. (1952) 1 Pike and Fischer, R.R. 10:347 32

S.R. 923, 86th Cong., 1st Sess. (1959) 15

S-2653, 86th Cong., 1st Sess. (1960) 15

S.R. No. 1857, 86th Cong., 2d Sess. (1960) 1 Pike and Fischer, R.R. 10:440 34

107 Cong. Rec. 2523, 87th Cong., 1961 15

Sen. Bill 1044 and H.R. Bill 6864, 87th Cong., 1st Sess. 15

H.R. 13286, 89th Cong., 2d Sess. (1966) 19, 20

Nos. 21,869 and 21,870

IN THE

United States Court of Appeals

For the Ninth Circuit

VALLEY VISION, INC.,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,
Respondents.

On Petitions to Review Decision and Orders of the Federal Communications Commission

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

The petitions for review were filed under the provisions of Section 402 (a) of The Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C.A. § 402 (a) (1962) and under Sections 2 and 3 of the Judicial Review Act of 1950, 64 Stat. 1129, 1130 (1950), 5 U.S.C.A. §§ 1032, 1033 (Supp. 1961). Review is sought of the Commission's Order released March 30, 1967, FCC 67-388 in Docket No. 17,171 (Case No. 21,869 herein) and also the Commission's Decision released May 16, 1967, FCC 67-571 (Case No. 21,870 herein).

Petitioner is a California Corporation, incorporated in the State of California, doing business in California, with its principal office located in Modesto, California. The venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 3 of the Judicial Review Act of 1950, 5 U.S.C.A. § 1033.

The Respondents herein are the United States of America and the Federal Communications Commission, an administrative agency created by the Communications Act of 1934, and charged with the execution and enforcement of that Act.

In its "Opposition To Motion To Dismiss" filed with this Court on June 16, 1967, Petitioner has set forth in detail the reasons why this Court has jurisdiction to hear and determine the merits of the instant appeals. Rather than repeat the same arguments advanced therein, Petitioner respectfully refers the Court to the aforesaid pleading. In brief, Petitioner established in its "Opposition to Motion to Dismiss" that contrary to Respondents' contention that Section 402 (a) of the Communications Act and Section 2 of the Judicial Review Act vest exclusive jurisdiction in the District of Columbia Court of Appeals in all cases wherein the Commission has issued a cease and desist order against any person, the fact is that Congress gave the District of Columbia Circuit exclusive jurisdiction of only those cases involving either (a) the exercise of the Commission's radio-licensing function; or (b) where the licensee or other party had initiated the action being appealed

from *e.g.,* the denial of a construction permit. It was also established that the Commission did not exercise its radio-licensing function in ordering Petitioner to cease and desist from its lawful operations in Placerville, and that Petitioner had in no way initiated the action being appealed from—indeed the Commission by its letter of November 1, 1966 (R. 15-16)[1] began what has ultimately come to pass. Accordingly, Petitioner exercising the option given it by Section 402 (a) of the Communications Act has decided to lay the venue in the Ninth Circuit as a matter of right.

In addition, it should be noted that Petitioner in the instant appeals is challenging the exercise of that which the Respondents, in their Motion to Dismiss, claim renders this Court without jurisdiction to determine the merits of these cases—the power of the Commission to issue cease and desist orders against persons who are non-licensees of the Commission. Petitioner submits and will demonstrate in Argument II below that the Communications Act of 1934, as amended, does not give the Commission any such power against non-licensees, and that therefore the Commission's cease and desist order against Petitioner was without authority of law and accordingly void. If, as requested, this Court finds that the Commission in fact surpassed its statutory authority and that no valid cease and desist order was issued, then yet another ground exists for bringing the instant appeals in this Court.

---

[1]References are to the page number of the Record as certified to this Court by the Commission on July 11 and August 9, 1967.

STATEMENT OF THE CASE

Placerville, California, is a community of approximately 5,000 persons, situated in the Sierra Nevada Mountains, approximately 40 miles east of Sacramento, California. Due to the mountainous terrain surrounding Placerville, television reception in the community is extremely poor. Accordingly, a Community Antenna Television System (CATV system) is needed in order to receive acceptable television pictures.[2]

Valley Vision, Inc., is a California corporation originally organized by John J. Markovich, the Vice-President of a Fresno Trailer sales company; Ronald LaForce, a Modesto attorney; Thornton Snider, a lumber dealer; and Robert B. Cooper, a communications engineer. Recognizing the need for a cable television system, Valley Vision, Inc., applied to the city council of Placerville for a franchise to construct such a system. Valley Vision's application was filed on November 9, 1965, and granted November 23, 1965. Application was also made to the Bank of America for a $120,000 loan to finance the system. Said application was approved on June 22, 1966.

On February 15, 1966, the Federal Communications Commission issued a press release announcing that it planned to adopt new rules to regulate all

---

[2]Community Antenna Television System can be defined as any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.

CATV systems. These rules were not adopted until March 4, 1966, and not released to the public until March 8, 1966. The rules were published in the Federal Register on March 17, 1966, as the Second Report and Order in Docket Nos. 14895, 15791, 31 Fed. Reg. 4540; 6 Pike and Fischer R.R. 2d 1717. In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which receive signals directly off-the-air from television broadcast stations.

In pertinent part, the rules provide that all CATV systems constructed after February 15, 1966, and located within the Grade A contour[3] of any television station located within the top 100 television markets, as defined by the American Research Bureau—a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits—may not extend any "distant signal"[4] beyond the Grade B con-

---

[3]"Grade A is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

"The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade A is described as being within the Grade A contour."

Southwestern Cable Co. v. U.S.A. and F.C.C., 378 F. 2d 118 (9th Cir. 1967).

[4]Section 74.1110(i) of the Commission's Rules defines "distant signal" as the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

tour of the originating station without first obtaining Commission approval after a hearing.

On March 6, 1966, John J. Markovich—who was the founder and most active stockholder of Valley Vision, Inc.—was killed in an airplane crash in Japan. The remaining stockholders of Valley Vision, Inc., thereafter relegated the construction activities of the company to Mr. Cooper—who was the company's President and a Director, but not a stockholder. Mr. Cooper, believing that the Commission's action in purporting to assert jurisdiction over CATV was not a lawful exercise of the Commission's authority, proceeded with construction and completed the Placerville system.

On October 24, 1966, Kelly Broadcasting Company, the owner and operator of Television Station KCRA-TV in Sacramento, California, filed a complaint (R. 1-7) with the Federal Communications Commission in which it contended that Placerville was within the Grade A contours of the Sacramento stations, and requested that the Commission issue an Order to Show Cause, directing Valley Vision, Inc., to show cause why it should not discontinue the carriage of all television signals except those of KCRA-TV and the other Sacramento stations.

On October 27, 1966, Great Western Broadcasting Company, licensee of Television Broadcast Station filed a similar request with the Commission (R. 8-11). In a letter dated November 1, 1966, the Commission requested Petitioner to respond to the charges made

by Kelly and Great Western (R. 15-16). Valley Vision responded to the Commission's letter on November 8, 1966, with a direct challenge to the Commission's authority to regulate CATV (R. 17-19).

On January 11, 1967, Valley Vision filed a "Petition for Waiver" (R. 238-287) asking the Commission to waive its Rules to permit such signals to continue to be carried. In its Petition for Waiver, Valley Vision showed that Placerville does not actually receive a signal of Grade A quality from Sacramento and that if Petitioner were required to discontinue all except Sacramento stations, Petitioner's CATV system would likely be ruined financially and would be forced to discontinue all service, with the consequent loss of all acceptable television reception in the community of Placerville.

On February 17, 1967, the Commission released an Order (R. 20-24) in which it refused to consider Petitioner's request for waiver and, instead, directed Petitioner to show cause why it should not be ordered to cease and desist from carrying "distant" television signals. On March 20, 1967, Petitioner timely filed a Petition for Reconsideration (R. 48-55) of the aforesaid Order to Show Cause. Said Petition for Reconsideration was Denied by an Order (R. 66) released March 30, 1967.[5] The show cause hearing was held

[5]On May 29, 1967, Valley Vision filed with this Court a "Petition to Review Order of the Federal Communications Commission" which requests the Court to reverse the Commission's action therein under review (Case No. 21,869).

on April 6, 7 and 10, 1967,[6] on an "expedited" basis. On May 16, 1967, the Commission released a *Decision* (R. 181-189) which ordered Petitioner to cease and desist from the carriage of certain television signals on its CATV system.[7]

Petitioner, on May 29, 1967, requested this Court to review and set aside the Commission's action of May 16, 1967 (Case No. 21,870), and also stay the effectiveness of the Commission's action.[8] On June 29, 1967, this Court, by Circuit Judges Merrill, Duniway, and Ely granted Petitioner's request for an interlocutory injunction and continued, until a hearing of the cases on the merits, the motion made by Respondents to dismiss Valley Vision's petitions for review.

ASSIGNMENTS OF ERROR

1. The Commission erred in ordering Petitioner to Show Cause why it should not cease and desist

---

[6]The show cause hearing was initially set to begin on April 18, 1967 (R. 24a). However, in an Order released March 9, 1967 (R. 40), the Chief Hearing Examiner accelerated the commencement date of the hearing to April 3, 1967. This action was subsequently upheld by the Commission (R. 58).

[7]Valley Vision was ordered to cease and desist from the carriage of Television Stations KGO-TV, San Francisco, KTVU, Oakland-San Francisco, KPIX, San Francisco, KRON-TV, San Francisco, KQED, San Francisco, KLOC-TV, Modesto, and KHSL, Chico, California (R. 187). The Commission permitted Valley Vision to continue to carry the signals of the Sacramento television station on its CATV system. (KCRA-TV, KXTV, KOVR and KVIE) (R. 187).

[8]On August 9, 1967 Cases Nos. 21,869 and 21,870 were consolidated by an order of the Court.

from the carriage of distant signals on its CATV system; and erred in ordering Petitioner to Cease and Desist from the carriage of distant signals on its CATV system because:

(a) The Commission does not possess the statutory authority to regulate or otherwise interfere with the operation of community antenna television systems; and

(b) The Commission does not possess the statutory authority to issue cease and desist orders against persons who are not licensees of the Commission.

2. Even assuming, solely *arguendo,* that the Commission does possess the statutory authority to regulate CATV systems and also to issue cease and desist orders against non-licensees of the Commission, the Commission's action in ordering Petitioner to cease and desist from the carriage of distant signals on its CATV system was arbitrary, capricious and denied Petitioner procedural due process because it:

(a) Failed to give adequate notice of the commencement of the hearing;

(b) Failed to afford Valley Vision a full and fair hearing;

(c) Failed to provide to Valley Vision sufficient time in which to prepare full and adequate findings of fact and conclusions of law;

(d) Failed to consider relevant and material evidence;

(e) Failed to reach a decision consistent with the evidence of record and consistent with its own Rules and Regulations;

(f) Failed to abide by its own Rules and Regulations; and

(g) Failed to consider and grant Valley Vision's request for a waiver of the Commission's Rules to allow the carriage of distant signals.

SUMMARY OF ARGUMENT

This appeal involves a Decision of the Federal Communications Commission which ordered Petitioner to cease and desist from the continued carriage of certain television signals on its CATV system in Placerville, California, for an alleged violation of the Commission's CATV rules. Petitioner challenges the validity of the Commission's action on three grounds.

First, the Commission does not possess the statutory authority to regulate or in any way interfere with the operation of non-microwave CATV systems. In assuming jurisdiction over CATV in 1966, the Commission reversed its 1959 decision which unequivocally and unanimously held that it did not have the statutory authority to regulate CATV. Moreover, on two occasions after that time—1959 and 1961—the Commission unsuccessfully attempted to have Congress specifically amend the Communications Act to give it such regulatory power. In spite of this, the Commission in 1966 claimed the ability to discover

the requisite statutory authority in the very sections of the Act which a previous Commission had disclaimed. This determination by the Commission is nothing more than a usurpation of power because Congress never intended to give the Commission the authority it now claims to have.

Congress created the Commission in 1934 for the express purpose of consolidating into one government agency the power to regulate separate, but related industries. Prior to 1934 the communications common carriers—telegraph, telephone and cable companies—were under the supervision of the Interstate Commerce Commission, whereas the Federal Radio Commission had authority to license radio stations. With the enactment of the Communications Act, both of these powers were vested in the Federal Communications Commission. That Congress did not intend to create a new area of federally regulated activity is clearly established by the legislative history of the Act.

Therefore, if the Commission is to regulate CATV systems, such systems must be either common carriers within the meaning of the Act or require a license from the Commission before commencing operations. The Commission, however, has held the non-microwave CATV systems are not common carriers within Title II of the Act and that licensing of CATV systems is a local function. Therefore, they are not subject to Commission regulation within Title III of the Act. Congress has not given the Commission any other power. Accordingly, its attempt to

regulate the CATV industry is without statutory authority and void.

Second, Petitioner challenges the validity of the Commission's authority to order non-licensees of the Commission to cease and desist from alleged violation of its rules. The Commission has sought to enforce its CATV rules by use of the cease and desist power. The simple fact is, however, that Congress only gave the Commission this power in 1952 so that it might exert more effective control over those whom it licenses. Inasmuch as the Commission does not license CATV operators, it does not have the power to order them to cease and desist from any conduct whatsoever, let alone for a violation of rules which it promulgated without statutory authority.

Third, Petitioner disputes the Commission's action herein appealed because Petitioner was not accorded a full and fair hearing prior to the taking of said action. The Commission had initially given Petitioner one month in which to prepare its defense for the "show cause proceeding". Petitioner relying on this, engaged a professional consulting engineer for the purpose of taking certain measurements which, it was believed, would show that the CATV rules were not applicable to Petitioner's system. The Commission's Chief Hearing Examiner, however, without giving any warning or explanation accelerated the hearing date two weeks. The Commission upheld this decision even though Petitioner pointed out that it would cripple Valley Vision's defense and that his action was in violation of Section 312 (c) of the Communi-

cations Act which requires that 30 days notice be given of all show cause hearings.

At the hearing all of Petitioner's efforts to introduce relevant evidence were bitterly contested by the Commission's Broadcast Bureau—whose appearance at CATV proceedings is not provided for in the Commission's Rules—with the Hearing Examiner in almost all instances granting the Bureau's demands that the evidence be excluded. All Petitioner was attempting to show was that the CATV rules do not apply to its system because Placerville is not located within the Predicted Grade A contour of any of the Sacramento commercial television stations.

Petitioner attempted to support its contention by a method specifically provided for in the Commission's rules which permits such a showing to be made. The Hearing Examiner, however, refused to admit Petitioner's showing into evidence. This ruling by the Examiner was ultimately upheld by the Commission which arbitrarily found the evidence to be irrelevant ". . . irrespective of its validity." Therefore even though the showing attempted by Petitioner was admittedly valid, the Commission refused to consider it because it would not have led to the result the Commission desired to reach.

Finally, at the completion of the hearing Petitioner was ordered to digest a record of approximately 430 pages and file proposed findings of fact within 7 days even though the Commission's rules allow for a minimum of 20 days. It is clear therefore that these proceedings failed to afford Petitioner even a semblance

of due process, and were manifestly unfair, unjust, and arbitrary.

ARGUMENT

I

THE FEDERAL COMMUNICATIONS COMMISSION POSSESSES NO STATUTORY AUTHORITY TO REGULATE OR OTHERWISE INTERFERE WITH COMMUNITY ANTENNA TELEVISION SYSTEMS

The Federal Communications Commission was created by Congress in 1934 with the enactment of the Communications Act[9] for the express purpose " . . . of regulating interstate and foreign commerce in communication by wire and radio . . ."[10] The Commission being a creature of Congress only has that authority and power which Congress has seen fit to give it. If the Commission in any way exceeds the statutory powers given to it by Congress its actions are perforce void and without any effect whatsoever.[11] As will be demonstrated below, when the Commission assumed jurisdiction over non-microwave CATV systems[12] it exceeded the authority Congress had given it.

---

[9]In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other sections are identically numbered in both the Act and the Code.

[10]Section 1 of the Communications Act.

[11]See, *CAB v. Delta Airlines,* 367 U.S. 316 (1947) ; *Alaska Airlines v. CAB,* 103 U.S. App. D.C. 225, 257 F. 2d 229 (1958).

[12]In the remainder of this brief any reference to CATV systems will only include the non-microwave or off-the-air type of CATV system where a high antenna is employed to catch broadcast signals. It is conceded that the FCC has jurisdiction over the microwave type of CATV system because it is a rebroadcast into the spectrum.

A. The Commission's Assumption of Jurisdiction in the Second Report and Order is Totally Inconsistent With Prior Commission Views on the Very Identical Question.

The Commission assumed jurisdiction over CATV systems on March 8, 1966, when a bitterly and closely divided (4-3) Commission adopted the Second Report and Order.[13] In so doing the Commission reversed the unanimous opinion of a 1959 Commission which had unequivocally denied the existence of the statutory authority to regulate CATV systems[14] and which on two previous occasions had unsuccessfully sought the legislation which would have specifically given it the authority which the 1966 Commission claims it always had.[15] The reasons given by the Commission in 1959 for its conclusion that it lacked jurisdiction are just as valid today as they were then. They include the following:

> "59. We have no doubt that, as the broadcasters urge, CATV's are related to interstate transmission (regardless of where the station retransmitter is located, the signal often originates, via network, in New York or elsewhere). Therefore it appeared to us that there is no question as to the power of Congress to regulate CATV's, or give the Commission jurisdiction to

---

[13]31 Fed. Reg. 4540, 6 Pike and Fischer, R.R. 2d 1717 (1966).

[14]*In the Matter of Inquiry into the Impact of Community Antenna Systems, etc.*, 26 FCC 403.

[15]S-2653, 86th Congress, 1st Sess. (1960) "A Bill to Amend The Communications Act of 1934 to Establish Jurisdiction in the Federal Communications Commission over Community Antenna Systems". See also S.R. 923, 86th Cong., 1st Sess. (1959). In 1961 the Commission again was unsuccessful in its attempt to have Congress authorize it to regulate community antenna systems. 107 Cong. Rec. 2523, 87th Cong. 1961; Sen. Bill 1044 and H. R. Bill 6864, 87th Cong., 1st Sess.

do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic statute under which we were created, and must look to that statute to find the extent of our jurisdiction and authority.

* * * * * * *

"62. *Jurisdiction over CATV's as 'engaged in broadcasting':*

Section 3 (b) of the Act defines 'radio communication' as the 'transmission by radio of writing, signs . . . including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission'. Section 3(o) defines 'broadcasting' as 'the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations'. Section 3(cc) defines 'broadcast station' as a radio station equipped to engage in broadcasting as herein defined.

"63. As for the suggestion that CATV systems are 'instrumentalities' within the meaning of Section 3(b) and that therefore (since they are engaged in the distribution of broadcast television programs to these members of the public who reside in locations which the CATV can feasibly reach and who are willing to pay the charge involved) they are engaged, in a sense, in 'broadcasting', this would not of itself give us jurisdiction to regulate these systems. Section 301 of the Act provides in general that the operation of any apparatus for the transmission of energy or communications or signals by radio shall be only pursuant to the Act and in accordance with a license issued thereunder, by the Com-

mission. This section clearly does not include the transmission of programs by CATV systems, since such transmission is by wire. We find no basis in definitions contained in Section 3 for the assumption of authority over these systems.

"64. *Regulation under 'plenary power' over communications:*

It is urged that we should regulate CATV's under our 'plenary power' over communications. Some parties have cited to us in this connection various subparagraphs of Section 303 of the Act, under which we are empowered to classify stations, encourage the use of radio, make regulations applicable to chain broadcasting, and generally make such rules and regulations, not inconsistent with law, as may be necessary to carry out the Act (subsections (a), (b), (f), (g), (i), (r)). However, we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications.

* * * * * * *

"69. *Authority to regulate CATV's because of adverse effect on broadcasting:*

It is urged by some broadcasters (often in connection with assertions made on the basis of Sections 3(b) and 3(o) mentioned above, or the 'plenary power' theory) that we should regulate CATV's because they have a substantial adverse impact upon broadcasting, and tend to thwart what is our mandate under Sections 1, 303 and 307(b), to foster nationwide radio and television service, etc. Cited in this connection are certain Supreme Court decisions dealing with the dairy industry *(United States v. Wrightwood Dairy*

Company, 315 U.S. 110 (1942) and *United States v. Rock Royal Co-op,* 307 U.S. 533). In the *Wrightwood* case the Court held that purely intrastate distribution of milk in competition with interstate commerce is subject to Federal regulation. Likewise, in *Houston, East & West Texas Railway Co. v. United States,* 234 U.S. 342, the 'Shreveport case', the Supreme Court held that the Interstate Commerce Commission could act to prevent a carrier from charging a discriminatorily low *intrastate* rate, though that Commission had no jurisdiction over interstate rates as such. In short, it is argued, aside from the fact that CATV's are within some of the definitions of the Communications Act (although their being so makes the argument stronger) we can control them because of their effect upon broadcasting, clearly an interstate business and one which we are instructed to foster and lead to orderly maximum development.

"70. Assuming this concept has legal validity (a point we believe is open to question, and upon which it is unnecessary for us to pass) in order to acquire jurisdiction on this basis, and *a fortiori* in order to utilize it, either in a rule making proceeding or on a case-to-case basis where we could consider whether or not a CATV system should be permitted entry into the field, we would have to make a finding that in a certain situation, or in situations falling within certain limits, there would be a substantial adverse impact on the local station. We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make

the necessary finding, either in a particular situation or generally. Moreover, in any event, jurisdiction on this basis would exist, if at all, only in certain situations, and would therefore be a fractional approach to the problem. It is more appropriate to seek certain other specific remedies, discussed later herein. For these reasons we cannot appropriately proceed to regulate or control CATV's on this basis.

"71. In sum, as to Issue No. 11, we find no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under Part 15 of our Rules with respect to their radiation of energy."

In spite of the well reasoned conclusion reached by the 1959 Commission that it lacked jurisdiction, a bare majority of the 1966 Commission found no difficulty whatsoever in finding the requisite statutory authority in the identical sections of the Act in which a previous unanimous Commission, after a more careful consideration of the question, was unable to find any ". . . basis for asserting jurisdiction or authority over CATV's . . ."

That same majority however, within the next few months requested from the 89th Congress what it called "clarifying legislation" with respect to CATV.[16]

[16]H.R. 13286, 89th Cong., 2nd Sess. (1966). For the Court's convenience the full text of this bill and also the majority and minority reports thereto have been included in a supplement following the appendix. The designation "S-" followed by a page number indicates the page in the Supplement at which the cited material can be found. H.R. 13286 and the committee reports will be found at S-1. Inasmuch as the Congress refused to enact the bill into law the minority reports are of particular importance. These reports are at S-57.

In reality this was nothing more than a request that Congress amend the Act to reflect what the Commission now contended was there in the first place. In this regard it should be noted that the majority report which accompanied H.R. 13286 clearly refused to agree or disagree with the Commission's action in assuming jurisdiction and left that question for the Courts.[17] Moreover, although the legislation was reported favorably out of Committee, the bill was not enacted into law by Congress. Thus Congress refused to ratify the Commission's position.

To summarize, there has taken place in the short span of seven years the following bizarre and completely contradictory chain of events: a unanimous Commission finding that the Communications Act did not give it the authority to regulate CATV; a request by the Commission that Congress specifically give it the requisite statutory authority; the refusal by Congress to do so; and the brazen assumption of that jurisdiction by a badly split Commission in 1966, with a simultaneous, but unsuccessful, attempt to get Congress to ratify the action it had taken. Is it any wonder that a person in the position of Robert Cooper—the person responsible for building Valley Vision—was, to say the least, confused as to the Commission's fickleness when it came to matters concerning CATV?

Although the Commission is not necessarily bound by its former decisions, it must give some rational

---

[17] S-32.

basis for treating similar situations in dissimilar ways.[18] It is submitted that the Commission actions described above defy any rational explanation. In any event, the Commission's assumption of jurisdiction over CATV cannot be supported by the provisions of the Communications Act, as amended, and its action is therefore void.

B. The Sections of the Act Relied Upon by the Commission Do Not Confer Jurisdiction to Regulate CATV and Were Never Intended by Congress to Do So.

When the Commission adopted its Second Report and Order it attached thereto a memorandum on its jurisdiction and authority. Contained therein is the basis for the Commission's belief that Congress conferred upon it the authority to regulate CATV systems. The pertinent sections of the Act upon which the Commission relies for its jurisdiction are Sections 1, 2, and 3—all of which are found in Title I of the Act which is entitled "General Provisions". In essence the Commission argues that Congress has given it the power to regulate all persons within the United States who engage in interstate and foreign commerce in communication by wire and radio, and that because CATV operators engage in communication by wire and/or radio[19] within the United States, they are subject to the rules, regulations and policies which the

[18] *Melody Music v. FCC,* 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965).

[19] The Commission appears to be uncertain as to whether CATV is either communication by wire or radio. The Commission, however, believes that it is one or the other. See "Memorandum on Jurisdiction and Authority," in the Second Report and Order, *supra.*

Commission has formulated. The Commission's argument is erroneous because it totally disregards the circumstances leading up to the passage of the Communications Act; because it totally disregards the legislative history of the Act; and, finally, because it distorts the plain language of its provisions.

Prior to the enactment of the Communications Act, there were two separate and distinct government agencies regulating what was then the field of communications. The Interstate Commerce Commission—as part of its authority to regulate interstate commerce—regulated communications common carriers. These included the telephone, telegraph and cable companies *i.e.,* the public utilities. The Federal Radio Commission had authority to license radio stations. In 1934, Congress sought to combine these two separate functions—the regulation of the public utilities (communication by wire) and the licensing of radio stations (communication by radio)—into one agency whose sole concern would be communications. Accordingly, it created the Federal Communications Commission. However, one thing Congress did not intend to do was to create a new area of federally regulated activity. This is made abundantly clear by the Congressional reports which accompany the Act.

Thus, the Senate Committee in its report on the Communications Act stated that the Act contains ". . . many provisions . . . copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business . . ." The Committee observed that any

departures from the text of the Interstate Commerce Act were only made for the purpose ". . . of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective."[20]

The House also made clear the objectives contemplated by the Communications Act. Its report states that:

> "The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations . . . .
>
> * * * * * * *
>
> "It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass

---

[20]S.R. No. 781, 73d Cong., 2d Sess. (1934). (1 Pike and Fischer, R.R. 10:221, 10:222.)

> adequate regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). (1 Pike and Fischer, R. R. 10:243-10:244.)

Furthermore, the basic construction of the Act itself is further evidence of the Congressional intent to provide only for the regulation of the communications common carriers and the licensing of radio stations. The Communications Act is made up of six titles, four of which could be considered explanatory and miscellaneous (Titles I, IV, V and VI) and two of which deal directly with the scope of the Commission's authority. These latter titles are Title II—"Common Carriers," and Title III—"Provisions Relating to Radio." Title I—"General Provisions"—and in particular Sections 3 (a) and (b) thereof, which defines wire and radio communication has only one purpose and that is to explain and clarify that which Congress has given the Commission the power to do *i.e.,* regulate common carriers and license radio stations. It does not, however, give the Commission the power to regulate an industry, the development of which, no one in 1934 could possibly have foreseen.

The Commission, in its attempt to justify its assumption of jurisdiction purports to construe Sections 3 (a) and (b) of the Act in such a way so as to encompass CATV systems. In so doing, however, it has opened a "Pandora's box" of inexplicable inconsistencies.

Section 3 (a) of the Communications Act defines wire communications as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . .". Although the Commission claims that CATV systems are included in this definition, the simple fact of the matter is that there are no provisions of the Act which have anything to do with the control and regulation of wire communications systems that are not common carriers within the meaning of the Act. Inasmuch as the Commission has correctly held that CATV systems are not common carriers within Title II of the Act[21] the only other source of its authority must be found in Title III of the Act which relates to radio.

Section 3 (b) of the Act defines radio communications as the ". . . transmission by radio or writing, signs, signals, pictures and sounds of all kinds . . ." This Section relates directly to Sections 301 and 307 of the Act (Title III) which gives the Commission the authority to license any apparatus for the transmission of energy or communications by radio within the United States. It is well established that the basic

[21]See, *Philadelphia Television Broadcasting Co. v. FCC,* 359 F. 2d 282 (U.S. App. D.C. 1966).

method of regulation that the Commission possesses over radio broadcast stations is the licensing power.[22] However, the Commission does not purport to have the authority to license CATV systems which it deems to be a local function.[23] Furthermore, CATV systems do not engage in radio communication or in the transmission of energy; they engage only in wire communication and therefore would only be subject to Commission regulation if they function as common carriers, which they do not. It appears, therefore, that the Commission has answered its own argument because if CATV systems are not common carriers within Title II of the Act and if they do not broadcast or transmit energy, and therefore do not require a license within Title III of the Act, CATV systems are not subject to Commission regulation because Congress has given it no other powers.

C. The Commission Does Not Possess Any Authority to Make Rules Regulating the Operation of CATV Systems.

The inconsistency of the Commission's position is made evident by the sections of the Act it relies upon for the power to make rules regulating CATV systems.

These Sections are 4 (i), 303 (f), 303 (r), and 303 (h). These are the general rule-making provisions of the Act and therefore are only related to those activities which the Commission has been given jurisdiction to regulate. In essence these sections give the

---

[22]*Regents of Georgia v. Carroll,* 338 U.S. 568, 94 L. Ed. 363 (1950).

[23]See Second Report and Order, *supra.*

Commission the power to make rules not inconsistent with the Act and also to carry out its provisions. The Act does not give the Commission the authority to regulate CATV. It follows, therefore, that any attempt to make rules which purport to regulate CATV must be without any force whatsoever.

It should be noted that all but one (4 (i)) of the sections relied on by the Commission for its rule-making authority are found in Title III of the Act which is concerned with the licensing of radio and television stations. There is no doubt that Congress intended to give the Commission the authority to make rules which deal with radio and television licensees. However, CATV systems are not radio or television broadcasters nor are they licensees of the Commission. That the Commission's power to make rules within Title III of the Act is strictly confined to the regulation of those whom it licenses or refuses to license was made crystal clear by the Supreme Court of the United States in the *Regents of Georgia v. Carroll*[24] case wherein it held that:

> ". . . As an administrative body, the Commission must find its powers within the compass of the authority given by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, *it prescribed licensing as the method of regulation*. 47 USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or

[24]338 U.S. 568, 94 L. Ed. 363 (1950).

> necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 US 470, 475, 84 L Ed 869, 874, 60 S Ct. 693; National Broadcasting Co. v. United States, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct. 997. *These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.*"[25]

As previously stated, CATV systems are not licensed by the Commission, but are licensed by the local authorities. In light of the above quoted precedent the conclusion is inescapable that the rules which the Commission has promulgated pursuant to Title III of the Act should be declared void because they purport to regulate non-licensees of the Commission.

---

[25]338 U.S. at 597-99 (emphasis added). See also, *Yankee Network Inc. v. FCC*, 107 F. 2d 212 (U.S. App. D.C. 1939); *Southwest Cable v. USA and FCC*, 378 F. 2d 118 (9th Cir. 1967); and *California Citizens Band Association v. United States*, 375 F. 2d 43 (9th Cir. 1967).

II

THE FEDERAL COMMUNICATIONS COMMISSION POSSESSES NO STATUTORY AUTHORITY TO ISSUE CEASE AND DESIST ORDERS AGAINST PERSONS WHO ARE NON-LICENSEES OF THE COMMISSION

Notwithstanding what the Court may find with respect to the jurisdictional question, the Commission erred in ordering Petitioner to cease and desist from the carriage of certain television signals on its CATV system because the Commission does not possess the power to issue cease and desist orders against non-licensees of the Commission. In issuing its cease and desist order, the Commission purported to rely upon Section 312(b) of the Communications Act of 1934, as amended. (R. 189.) Section 312(b) of the Act provides:

> "(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

That this section was added to the Act in 1952 *solely* for the purpose of enabling the Commission to more effectively control its *licensees* is established, beyond any doubt, by the Congressional Committee Reports which accompanied the amendment of the Act.

The Senate Report explaining the amendment of Section 312 states that:

"This section amends Section 312 of the present Act which deals with revocation of licenses. Under existing law a station license may be revoked for false statements either in the application, or in the statement of fact which may be required from time to time, which would warrant the Commission in refusing to grant a license on an original application; or for failure to observe any of the restrictions or conditions of the Act or regulations of the Commission authorized by the Act or a treaty ratified by the United States. It is clear, therefore, that revocation is the sole administrative penalty in the case of violations ranging from the most serious to the least minor and affecting those who may innocently violate regulations of the Commission on technical matters.

"The committee feels that this is not a satisfactory situation for two reasons: The Commission is reluctant to revoke a license for a minor offense and therefore minor offenses may be committed almost with impunity; and there exists no clear distinction between types of offenses. It is felt that some method of procedure short of revocation should be provided for minor or less serious violations. It is, therefore, provided that the Commission may issue cease-and-desist orders for such less serious violations.

"The revocation penalty would remain in effect only (1) for those situations in which the Commission learns of facts or conditions after the granting of a permit or license which would have warranted it in refusing the grant originally had it known those facts; (2) for violation or failure to observe provisions of a treaty ratified by the United States; and (3) for violation or failure to observe the conditions of any cease-and-desist

order issued in accordance with the provisions of this section. As in the case of cease-and-desist orders, the Commission must first issue an order to show cause why a license should not be revoked.

"The cease-and-desist action would apply to those cases where a licensee has (1) failed to operate substantially as set forth in his license; (2) failed to observe the restrictions of this Act or of a treaty ratified by the United States; and (3) violated or failed to observe any rule or regulation of the Commission authorized by this Act.

"It will be seen that violation of conditions or restrictions of a treaty may be proceeded against initially either by a revocation proceeding or the less onerous cease-and-desist proceeding, thus allowing Commission discretion as to the seriousness of the alleged offense. Moreover, the recommended language clothes the Commission with power to prevent persistent minor violations by making violation of a cease-and-desist order cause for a revocation action.

"The cease-and-desist procedure is a time-tried and wholly successful one in many administrative agencies and the committee believes that its adoption by the Federal Communications Commission will be salutary. The language here recommended has had the approval of all witnesses who testified on the bill."[26]

The Conference Report on the addition of 312 (b) of the Act is also clear as to the Congressional intent in giving the Commission the power to issue cease and desist orders:

---

[26]S.R. No. 44, 82d Cong., 1st Sess. (1951). (1 Pike and Fischer, R.R. 10:282; emphasis added.)

"Section 11 of the Senate bill proposed to rewrite Section 312 of the Communications Act of 1934, and would have modified somewhat the grounds on which the Commission could revoke licenses and added new provisions authorizing the Commission to issue cease and desist orders in certain specified situations.

"The section as it is retained in the conference substitute is the same as the House amendment in so far as the grounds for revocation are concerned, but the provisions which would have authorized the Commission to suspend licenses or to impose forfeitures have been eliminated. *It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations by licensees.* As an alternative to revoking the license in case of failure to obey a cease and desist order, the Commission will be able to invoke the aid of the courts, under Section 401(b) of the Act, to secure compliance. The courts will be able to enforce compliance through their power to punish for contempt."[27]

Congress reaffirmed its position in 1960 when in refusing to give the Commission the power of suspension over licensees for violations of the Act and/or the Commission's Rules it stated:

"The obvious purpose for giving the FCC the authority to suspend a license appears to be an effort to provide the Commission with a remedy less drastic than the so-called death sentence—

---

[27]H. Rep. No. 2426, 82d Cong., 2d Sess. (1952). (1 Pike and Fischer, R.R. 10:347; emphasis added.)

revocation or failure to renew . . . Your committee is mindful of the fact that 8 years ago the Congress provided the Commission with a remedy additional to the original remedy of revocation and criminal sanctions when it incorporated the cease-and-desist procedures in the Communications Act. *In the conference report on the 1952 amendments to the act it was stated that the authority to issue cease-and-desist orders would give the Commission a means by which it could secure compliance by the licensee with the provisions of the act and with the regulations thereunder.*

"The cease and desist power, however, appears to have been little utilized by the Commission. Indeed until this very year it does not appear to have been utilized by the Commission in the broadcasting field. Yet your committee in its report in 1952 noted the cease-and-desist procedure is a successful one in many administrative agencies. It appears, therefore, that it would be unwise to add the suspension power at this time, particularly because of its impact on the general public, when there is no showing that the cease-and-desist power has not worked. Your committee is still of the opinion that this can be utilized very effectively.

"*We feel that the sanctions now available in the Communications Act,* plus the forfeiture penalties herein being provided, *give the Commission adequate tools to take effective action against offending licensees* without the adverse results that flow from a temporary suspension of a broadcasting facility. Experience may prove that cease-and-desist action and monetary penal-

> ties are not sufficient. If it does, then this committee will act quickly to remedy the situation."[28]

The foregoing makes reference to the fact that the cease and desist power had been ". . . little utilized by the Commission" up to 1960. This was indeed true. Up to the issuance of the Second Report and Order in 1966, the Commission had issued cease and desist orders a total of three times.[29] Although all of them were issued against non-licensees of the Commission, only one—the last one in 1957—was appealed, to wit: *C. J. Community Services, Inc. v. FCC,* 246 F. 2d 660 (U.S. App. D.C. 1957). And on appeal, the United States District Court for the District of Columbia reversed the Commission. The concurring opinion of Circuit Judge Washington stated at page 665 that:

> "Turning to the question of the issuance of the cease and desist order, it seems clear that the Commission misconceived its statutory authority. The provisions for the issuance of cease and desist orders were added to the Communications Act in 1952 . . . to provide the Commission with a sanction less severe than license revocation. See S. Rep. 44, 82nd Cong., 1st Sess. 10 (1951)."

Here, in seeking to enforce its CATV rules against non-licensees by means of the cease and desist power the Commission has once again misconceived its statu-

---

[28]S.R. No. 1857, 86th Cong., 2d Sess. (1960). (1 Pike and Fischer, R.R. 10:440; emphasis added.)

[29]*National Plastik-Ware Fashions,* 9 Pike and Fischer, R.R. 982 (1953); *Prime Incorporated,* 12 Pike and Fischer, R.R. 309 (1955); and *C. J. Community Services, Inc.,* 13 Pike and Fischer, R.R. 1 (1956).

tory role. Accordingly, it is submitted that the cease and desist order which has been issued in the instant case against Petitioner is without statutory authority and therefore void.

As this Court is aware, Respondents have challenged the jurisdiction of this Court to hear and determine the merits of the instant appeals on the grounds that Section 402 (b) of the Communications Act has conferred upon the Court of Appeals for the District of Columbia exclusive jurisdiction in all cases in which a cease and desist order has been issued by the Commission against any person. This contention has been clearly and unequivocally refuted by Petitioner in its "Opposition to Motion to Dismiss" and also in its "Jurisdictional Statement" in this brief.

The Commission's contentions with respect to jurisdiction are an attempt to pull itself up by its own bootstraps. Having attempted without statutory authority to issue a cease and desist order against a person who is not a license-holder and has never subjected himself to the jurisdiction of the Commission, the Commission now asserts that the victim of the worthless cease and desist order must proceed in the Appeals Court of Washington, D.C., which, by the terms of the Communications Act, has been given jurisdiction over certain types of cases involving Commission *licensees*. Even assuming, solely *arguendo,* that the District of Columbia Court might be a suitable forum in which to litigate the validity of a cease and desist order otherwise properly issued against a

Commission *licensee,* it does not follow that the victim of the worthless cease and desist order issued without any statutory authority is precluded from attacking that order in his local federal courts. On the contrary, all of the authorities cited above make it very clear that Congress never intended cease and desist orders to be employed by the Commission against anyone except licensees. Consequently, to the extent that the Communications Act provides that appeals against cease and desist orders may be taken in the District of Columbia Courts, it is clear that Congress was not departing from the basic principle that only licensees of the Commission should be required to litigate in courts situated outside their own local circuits.[30]

Moreover, entirely aside from the question of the proper venue in which to litigate a cease and desist order, this appeal involves, in actuality two separate appeals: one from the cease and desist order and one from the order, issued by the Commission on February 17, 1967, directing Petitioner to show cause why a cease and desist order should not be issued.

Even if it could be rationally argued that the venue of the appeal from the cease and desist order lies in Washington, D.C.,—and, as demonstrated above, such an argument is wholly untenable—Petitioner must still be found to be properly in this Court on its appeal from the issuance of the order to show cause. For such "show cause" orders are not even mentioned

---

[30]See, pp. 3-8 of Petitioner's "Opposition to Motion to Dismiss."

in the categories of appeals which the Communications Act permits an appellant to bring in the District of Columbia Circuit.

III

ASSUMING THAT THE COMMISSION DOES HAVE AUTHORITY TO REGULATE CATV SYSTEMS AND DOES HAVE AUTHORITY TO ISSUE CEASE AND DESIST ORDERS AGAINST NON-LICENSEES, THE COMMISSION'S ACTION IN ORDERING PETITIONER TO CEASE AND DESIST FROM THE CARRIAGE OF CERTAIN SIGNALS ON ITS CATV SYSTEM WAS ARBITRARY, CAPRICIOUS, AND DENIED PETITIONER PROCEDURAL DUE PROCESS

Entirely aside from all of the other deficiencies vitiating the cease and desist order in this proceeding, the order was issued after proceedings which failed to afford the Petitioner even a semblance of due process, and which were manifestly unfair, unjust, arbitrary and capricious.

The proceedings before the Commission began when, on February 17, 1967, the Commission released an order, directing Petitioner to show cause why it should not be ordered to cease and desist from carrying certain television signals on its CATV system. The "Order to Show Cause" alleged that the carriage of these signals by Petitioner's CATV system constituted a violation of Sections 74.1105 and 74.1107 of the Commission's Rules, which purport to require CATV systems operating in the so-called "top 100" market to obtain the consent of the Commission to such operation. In determining whether a CATV sys-

tem is located within the "top 100" market, the Rules provide that a determination shall be made whether the community in which the system is located is situated within the "Grade A contours" of a television station situated in one of these markets. If the answer to this determination is affirmative, the Commission considers that the CATV system is located within the market for purposes of its Rules.

The determination whether a particular community is located within the Grade A contour of a particular television station is essentially an engineering matter. Following the issuance of the show cause order, Valley Vision engaged a professional consulting engineer, for the purpose of taking actual field intensity measurements which, it was believed, would show that Placerville was not located within the Grade A contour of any commercial television broadcast station, situated in a "top 100" market.

Immediately after the issuance of the show cause order, the Commission's Chief Hearing Examiner issued an order directing that the show cause hearing be held on April 18, 1967 (R. 24a). Plans were made by Petitioner, looking towards the taking of the requisite field intensity measurements and the preparation of an adequate defense to the "show cause" order, prior to the scheduled hearing date. However, on March 8, 1967, without any warning and without giving any explanation, the Chief Hearing Examiner arbitrarily accelerated the hearing and ordered that it commence instead on April 3, 1967 (R. 40). Valley Vision appealed the Chief Examiner's order to the

Full Commission, pointing out that it would cripple Valley Vision in the presentation of its case (R. 43-47), and pointing out further that the 25 days notice of hearing afforded by the Chief Examiner's action was less than the 30 days required by the statute.[31] The Commission, however, overruled Valley Vision's protest and directed that it go to hearing as ordered by the Chief Examiner, whether prepared or not (R. 58).

The actual hearing got underway on April 6, the Hearing Examiner having extended it three days to allow counsel to attend an important broadcasters convention. Although Valley Vision was seriously hampered in the presentation of its case by the shortness of time, it nevertheless offered evidence, showing that Placerville is not located within the Grade A contours of any commercial television station situated in a top 100 market (in this case, Sacramento).

Much pertinent and relevant evidence offered by Valley Vision was summarily rejected by the Commission's Hearing Examiner, who repeatedly overruled efforts by Valley Vision to present a complete case. At the very outset of the proceedings, Valley Vision moved to strike the appearance of the Commission's Broadcast Bureau which intervened and participated in the proceedings as an adversary, even though the Commission's Rules do not provide for such intervention (Tr. 2-3). Valley Vision pointed out that it was anomalous for the Commission's

[31]Cf., Section 312 of the Communications Act.

Broadcast Bureau to appear in the proceedings, especially when the Commission's CATV Task Force made no such appearance. Valley Vision's objections were, however, overruled and the whole proceeding came to be characterized by frequent and lengthy speeches on the part of the Broadcast Bureau and the two participating television stations, objecting to Valley Vision's every attempt to defend itself.

Although Valley Vision had filed a formal written request for waiver of the CATV Rules (R. 238-287), the Hearing Examiner refused to hear any evidence whatsoever directed to such a waiver, notwithstanding the clear requirement laid down by the United States Supreme Court that the Commission must hear proper requests for waivers of its Rules. *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956). In addition, the Examiner rejected engineering evidence offered by Valley Vision, showing that on the basis of new engineering data just published by the Commission in Docket No. 16004, Placerville was not within the Grade A contours of the Sacramento stations. And the Examiner rejected all attempts by Valley Vision to show the actual measured location of the Grade A contours of the Sacramento stations, on the apparent grounds that the Commission did not care where these contours were actually located.

Following the close of the hearing, Valley Vision requested that it be afforded 20 days time in which to file proposed findings of fact and conclusions of law (R. 425), as provided by the Commission's

Rules.[32] Even this fundamental right was, however, denied to Valley Vision, and Valley Vision was directed to file proposed findings of fact and conclusions of law on an expedited basis within 7 days after the conclusion of the hearing. It was manifestly impossible for Valley Vision to complete adequate findings and conclusions, digesting a record of 430 pages within 7 days. Accordingly, Valley Vision was forced to limit its findings and conclusions to "Skeleton Findings and Conclusions" (R. 217-226).

On May 10, 1967, the Commission—with two Commissioners dissenting and one Commissioner absent—issued its decision, purporting to order Valley Vision to cease and desist from the carriage of any television signals except the signals of the Sacramento and Stockton stations. The decision (R. 181-189) shows that the Commission arbitrarily and capriciously refused to even consider the merits of Valley Vision's request for waiver of its Rules.

Moreover, the decision shows the Commission distorted and stretched its own rules in order to find Valley Vision subject to its jurisdiction when, in fact, the Rules themselves exclude from their purview communities such as Placerville, which are not located within the Grade "A" contour of television stations situated in a "top 100 market". Thus, although in cases such as this one where the terrain conditions are irregular, the Commission's Rules provide for the use of alternative methods of computing locations of

[32]Section 1.263 of the Commission's Rules and Regulations.

the Grade "A" contour,[33] the Commission refused to allow Valley Vision to avail itself of the alternative coverage prediction methods specified in the Rules. Instead, the Commission insisted that the location of the Grade "A" contours of the Sacramento television stations be determined by a rigid and inflexible engineering procedure which even the Commission left-handedly admits is not really valid where, as here, mountainous terrain is involved.

Indeed, the Commission makes the remarkable statement that "irrespective of its validity, Valley Vision's engineering showing is irrelevant and inadmissible" (R. 185). In other words, while the Commission conceded that Valley Vision's showing of the locations of the Grade "A" contours of the affected television stations was the more accurate showing, the Commission nonetheless stubbornly chose to be guided by the inaccurate showing submitted by its Broadcast Bureau merely because that showing led to the result which the Commission desired to reach. No further comment is required to establish the total unfairness and bias which characterized the Commission's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's actions herein were arbitrary, capricious and without statutory authority. Accordingly, the Commission's Memorandum Opinion

---

[33]Section 73.684(f) of the Commission's Rules.

and Order which denied Petitioner's request for reconsideration and also its Decision which ordered Petitioner to cease and desist from the carriage of certain television signals on its CATV system should be reversed. Petitioner further requests such other relief as this Court may deem just and proper.

Dated, September 18, 1967.

Respectfully submitted,
LAUREN A. COLBY,
GENNARO D. CALIENDO,
Counsel for Petitioner
Valley Vision, Inc.

Of Counsel:
HALLEY, HEAD, LAFORCE & MOORAD.

CERTIFICATE OF COMPLIANCE

We certify that in connection with the preparation of this brief, we have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with these Rules.

LAUREN A. COLBY,
GENNARO D. CALIENDO.

(Appendix Follows)

Appendix

Appendix

STATUTES AND REGULATIONS INVOLVED

The relevant parts of the statutes and regulations to which references are made in Petitioner's brief follow:

Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*

Section 1:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act. (Footnote omitted.)

Section 2(a):

> The provisions of this Act shall apply to all interstate and foreign communication by wire or

radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.[2] (Footnote omitted.)

Section 3(a) (b):

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the point of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Section 4(i):

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 301:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any such place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United

States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.'

Sec. 302.[41] (Footnote omitted.)

Section 303 (f) (h) (r):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.[45]

---

[45] (Footnote omitted.)

Section 307 (a):

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act shall grant to any applicant therefor a station license provided for by this Act.

Section 312 (b) (c):

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commision is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after

hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Section 402 (a) (b):

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decision and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

Judicial Review Act, 64 Stat. 1129, 5 U.S.C. §§ 1031-1042.

Section 2:

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communciations Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the

Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

Section 3:

The venue of any proceeding under this Act shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

Rules and Regulations of the Federal Communications Commission, 47 C.G.R.

Section 1.263:

Proposed findings and conclusions.—(a) Each party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law: provided, however, that the presiding officer may direct any party other than Commission

counsel to file proposed findings of fact and conclusions, briefs, or memoranda of law. Such proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within 20 days after the record is closed, unless additional time is allowed.

Section 73.684 (f):

In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 2 to 10 mile sector, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showing should describe the procedure employed and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method. In directions where the terrain is such that negative antenna heights or heights below 100 feet for the 2 to 10 mile sector are obtained, a supplemental showing of expected coverage must be included together with a description of the method employed in predicting such coverage. In special cases, the Commission may require additional information as to terrain and coverage.

Section 74.1101 (i):

Distant signal. The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

Section 74.1105:

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watt or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educa-

tional television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under §73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and state educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to §74.1109 of this chapter, within thirty (30) days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; Provided, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of §74.1107 of this chapter. Where no petition pursuant to §74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of §74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

Note 1: As used in §74.1105, the term "predicted Grade B contour" means the field intensity contour defined in §73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in §73.684 of this chapter.

Section 74.1107:

(a) No CATV system operating within the Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Com-

mission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under §74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under

§74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

SUPPLEMENT

HOUSE OF REPRESENTATIVES

89th Congress, *2d Session* — Report No. 1635

REGULATION OF COMMUNITY ANTENNA SYSTEMS

JUNE 17, 1966.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

MR. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H.R. 13286]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 13286) to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

(b) Subsection (h) of such section 3 is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

SEC. 2. Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience, or necessity requires, have authority—

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions

with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional

football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.

"(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

Purposes of Legislation

The principal purposes of the legislation are to—

(1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems;

(2) deny to the Federal Communications Commission the authority to regulate CATV systems as common carriers;

(3) leave intact the authority of States and local governments to regulate CATV systems except where such regulation is in direct conflict with the Communications Act of 1934, or regulations promulgated thereunder;

(4) prohibit program origination by CATV systems except where the FCC determines that such origination would serve the public interest;

(5) authorize the FCC to require CATV systems to delete professional team sport programs under certain specified circumstances;

(6) direct the FCC in applying its CATV rules with regard to carriage of local broadcast stations to give due regard to avoidance of substantial disruption of services to subscribers by CATV systems in operation of March 1, 1966, resulting from the limited channel capacity of any such systems.

Section-by-Section Description of the Committee Amendment

The bill is reported with an amendment in the nature of a substitute. The following is a section-by-section description of the amendment.

section 1

This section amends section 3 of the Communication Act of 1934 (defining terms used in the act) in two respects.

Definition of "Community Antenna System"

First, it would add to section 3 a definition of the term "community antenna system." As defined, this term means any facility which receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.

Definition of "Common Carrier"

Second, this section amends the definition of the term "common carrier" in section 3(h) to make it clear that, for the purposes of the Communications Act of 1934, a person engaged in operating a community antenna system would not be deemed a common carrier because of such operation.

SECTION 2

This section adds to part I of title III of the Communications Act of 1934 a new section 331 relating to community antenna systems.

Regulatory Authority of FCC

Subsection (a) of this proposed new section authorizes the Federal Communications Commission, as the public interest, convenience, or necessity requires, (1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of the Communications Act of 1934, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and (2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

Grandfather Clause

However, the Commission would be required, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, to give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

Program Origination

Under proposed section 331(b) no community antenna system could transmit over its system any program or other material other than that which it had received directly or indirectly over the air from a broadcast station. However, the Federal Communications Commission could authorize by general rule limited exceptions to this prohibition to permit such transmissions, but this would require an express finding that it would serve the public interest.

Professional Team Sports Contests

The Federal Communications Commission would, under proposed section 331(c), be required to prescribe such rules and regulations and issue such orders as might be necessary to require the deletion by community antenna systems of any professional football, baseball, basketball, or hockey game if, after application by the appropriate league, the Commission found that the failure to delete such game would be contrary to the purposes for which the antitrust laws

are made inapplicable to certain agreements under Public Law 87-331.

Relationship Between Federal, State, and Local CATV Regulation

Proposed section 331(d) provides that nothing in the Communications Act of 1934 or in any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of the act or regulations promulgated under it.

Background of Legislation

This legislation was introduced at the request of the Federal Communications Commission. In the Commission's Second Report and Order issued March 8, 1966, the Commission stated as follows:

> 152. *Legislative proposals.* . . . We turn now to a brief discussion of the legislative proposals which we believe are desirable.
>
> 153. There are four areas which we shall urge to the Congress as particularly warranting its attention:
>
> (i) As we stated in the Notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome Congressional guidance as to policy and Congressional clarification of our authority in all respects

in this field. See Notice, par. 31, 1 FCC 2d at p. 465.

(ii) We believe that Congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in pars. 128-129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire pay-TV operation which could adversely affect that industry or indeed supplant it. More important, were wire pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to Section 325(a) applicable to CATV systems (i.e., whether, or to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See pars. 131-

138.[70] Several parties such as NBC have urged that a Section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a Section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting Congressional (and Commission) consideration,

[70]The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by Station WNDU-TV, South Bend, Indiana. See Letter to Mr. Asa S. Bushnell, dated October 28, 1955, Public Notice, dated October 29, 1965, Mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU-TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA Television Committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under Article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 N.C.A.A. Television Committee, January 10-12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area) as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

including such aspects as how a "retransmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The bill, H.R. 13286, was drafted by the Commission to carry out the above legislative recommendations.

The explanation of the bill submitted by the Commission to the Congress may be found in appendix A.

HISTORY OF CATV DEVELOPMENT

CATV systems were first developed as a means of extending TV service into communities which found themselves without any local TV stations when the FCC imposed a freeze on the licensing of television stations. This freeze lasted from September 1948 to July 1952. The first such system was apparently established on a noncommercial basis in Astoria, Oreg., in 1949 to pick up and relay the signal of a Seattle, Wash., station. The first commercial system was established in Lansford, Pa., in 1950.

CATV systems consist of one or several receiving antennas located at some high point near the community to be served. The antennas receive TV signals from one or more stations located outside the com-

munity to be served by the CATV system either directly off the air or by means of microwave relay stations where distances are too great for off-the-air reception. The signals then are amplified and carried by wires or cables to the homes of subscribers. The wires or cables are either owned by the CATV systems and pole space for their placement is rented from telephone companies or utilities, or they are owned by telephone companies and leased by CATV systems.

CATV systems originally provided access to television programs in situations where individual homeowners in remote areas were unable to receive such programs off-the-air by means of rooftop antennas. In furnishing such a service, CATV systems play a role similar to that played by such technical devices as boosters, translators, and satellite stations, and CATV systems have sought to supplant the latter devices.

Subsequently, however, CATV's started up in areas served by one or two local television stations and brought into such areas the signals of distant television stations. Thus, CATVs became instrumental in placing the local station into competition with the distant stations.

In more recent years, the growth of CATV proved to be explosive. By mid-1965, there were approximately 1,800 communities with operating CATV systems serving close to 2 million homes. Some 750 additional communities had franchised CATV systems which were about to be constructed, and in more

than 900 communities applications for CATV franchises were pending.

Additionally, the size of the systems increased as did the channel capacity of the systems. While the older systems had about 5 channels, the more recent systems have 12 channels and systems with even greater channel capacity are being engineered.

The promoters of CATV systems have held out the expectation of wiring up 85 percent of the TV sets in 40 million homes.

Under the circumstances, the Commission felt that the unregulated growth and operation of CATV systems were threatening the orderly development of TV broadcasting as planned by the Congress and the Commission.

LOCAL SERVICE BY COMMERCIAL AND EDUCATIONAL TELEVISION STATIONS

The broad statutory base for the subsequent regulation of television broadcasting was provided by the Congress in 1934 long before the advent of television. Section 1 of the Communications Act of 1934 directs the FCC—

> to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service.

More specifically section 307 directs the Commission to—

> make such distribution of licenses, frequencies, hours of operation, and of power among the sev-

eral States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same.

Based upon these congressional mandates, the Commission in 1952 in its Sixth Report and Order assigned commercial and educational VHF and UHF channels to communities throughout the United States. In making the commercial assignments the Commission aimed at reaching several goals in the following order of priority: (A) to make available at least one TV service to all parts of the United States; (B) to provide at least one television station to each community; (C) to make available at least two TV services to all parts of the United States; (D) to provide at least two television stations to each community, and (E) to distribute the remaining frequencies among major population centers.

The basic purpose of this allocation plan was to provide all viewers in the United States with one or more television services, and at the same time to provide as many communities as available spectrum space would permit with one or more local TV stations to serve as media of local self-expression. Much spectrum space could have been preserved if the Commission had sought only to reach the first objective—namely to provide to U.S. viewers television services emanating from a limited number of metropolitan stations instead of from numerous community stations.

During the decade between 1952 and 1962, most of the 681 VHF frequencies assigned by the FCC were

activated. However, only 7 percent of the 1,544 UHF stations assigned by the Commission became operative. In order to speed up the activation of the unused UHF channels, Congress in 1962 enacted all-channel receiver legislation. In passing this legislation, Congress sought to reach two objectives: *(a)* to assure, insofar as possible, that outlets for local self-expression provided for in the Commission's 1952 allocation plan would be activated, and *(b)* in this manner to create a sufficient number of additional stations to make available a full complement of affiliates for each of the three networks and to make possible a fourth national television network.

Also, in 1962, Congress took the step of enacting legislation providing for Federal matching grants for the construction of educational television stations in the hope that such grants would help accelerate the activation throughout the United States of additional educational stations, particularly in the UHF band.

COMMISSION REGULATION OF CATV

In the opinion of the Commission, the orderly development of UHF and VHF commercial and educational TV stations to serve local needs, as envisaged by the Congress and the Commission, was being placed in jeopardy by the unregulated explosive growth of CATV. Therefore, in promulgating in March, 1966, rules applicable to all CATV operations—both off-the-air and microwave—the Commission sought to reach two important objectives: (1) To protect existing and future local stations which can serve as media

of local self-expression from adverse impact of CATV operations and to insure fair competition between CATV operators and broadcasters; and (2) to preclude the development of a system of pay television as a byproduct of unregulated CATV operations.

Being mindful of the justifiable desire of viewers residing in smaller communities to have access at least to all three national network programs, the Commission sought to make the entry into business of CATV's in such situations less difficult than in the case of larger communities where viewers already have access to the three network programs and, possibly, independent local programs, and where new UHF stations are most likely to be activated. This accounts for the difference in treatment by the Commission of CATV's in the top 100 markets.

CONGRESS AND COMMISSION'S CATV RULES

In the course of the committee hearings, a great deal of testimony was presented concerning the CATV rules adopted by the Commission on March 8, 1966, and how these rules differed from the Commission's earlier CATV rules. Conflicting points of view have been presented to the effect that these present rules should be tightened to give better protection to broadcasters or that they should be modified to allow greater freedom of action to CATV systems.

In reporting the instant legislation which delineates the scope of authority of the Commission with regard to CATV regulation, the committee does not attempt to pass any judgment on the reasonableness, adequacy

or inadequacy of the present rules under any and all given factual circumstances. Parties who may feel aggrieved by particular aspects of the present rules have available the traditional administrative and judicial remedies to bring about review, reconsideration, and possibly such modifications as they may be seeking. The instant legislation grants to the Commission broad powers which are sufficiently flexible to permit the Commission to make any adjustment in the present rules and to adopt such new rules as it may deem desirable in the public interest.

GRANDFATHER CLAUSE

In applying any of the rules and regulations concerning the carriage of local broadcast stations by CATV systems, the committee amendment provides that the Commission shall give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

The channel capacity of many of the older and smaller CATV systems is limited to 5 channels in contrast to the more recent and larger systems which usually have 12 channels. The application to systems with limited channel capacity of the Commission's rules requiring the carriage of all local stations could result in depriving subscribers of such systems of program services from distant stations because the capacity of these systems is too limited to transmit the distant signals as well as local signals. It is the pur-

pose of the "grandfather clause" to prevent the disruption of subscriber services in such instances. It is the intent of the committee that this "grandfather clause" be administered by the Commission so as to leave intact services rendered to subscribers by CATV systems with limited channel capacity which were in operation on March 1, 1966.

COMMISSION'S PRESENT REGULATORY AUTHORITY

In its Second Report and Order the Commission stated its conclusion that the present provisions of the Communications Act of 1934 give to the Commission authority to regulate CATV systems.

> 154. Authority for adoption of these rules is contained in Sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of Section 1 that the general purpose of the Act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by federal authority"; of Section 303(h), "to establish areas or zones to be served by any station"; of Section 307(b), to make "a fair, efficient, and equitable distribution of radio service" among the several states and communities", Section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and Section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule making power bestowed upon the Commission in Sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger

> and more effective use of radio in the public interest". Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" *(FCC v. Pottsville Bctg. Co.,* 309 U.S. 134, 138; see also *NBC v. U.S.,* 319 U.S. 190).

In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.

It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems.

The Commission in 1962 held that it had authority to regulate CATV operations which required microwave transmission for the purpose of bringing to the CATV system television signals too far removed to be received off the air. In the *Carter Mountain* case, the courts in 1963 upheld the Commission's authority in this respect and in the following years grants of microwave licenses were conditioned to secure car-

riage of local stations by CATV systems and to preclude duplication of local TV programs by distant signals imported by CATV systems.

In 1966, the Commission extended its regulation to off-the-air CATV systems and at the same time modified the carriage and nonduplication requirements to be observed by all CATV systems.

EARLIER CONSIDERATION OF CATV LEGISLATION

In 1959 (86th Cong., 1st sess.), after extended hearings on the subjects of boosters, translators, satellites and CATV's the Senate Committee on Interstate and Foreign Commerce reported legislation (S. 2653) providing for the licensing of CATV systems by the Federal Communications Commission (S.Rept. No. 923, Sept. 8, 1959).

The committee pointed to the responsibility imposed upon the Commission by the Communications Act of 1934 to make available, as far as possible, to all the people of the United States, an efficient, nationwide, radio communications service and to make such distribution of facilities among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of them.

The committee noted that in carrying out this mandate, the Commission in 1952 in its sixth report and order had assigned television frequencies to over 1,250 communities. The committee stressed that in making these allocations, the Federal Communications Commission had followed certain principles in terms of priorities. The first priority was to provide

at least one television service to all parts of the United States. The second priority required the provision of at least one television broadcast station to each community.

The Committee urged the adoption of CATV licensing legislation because it was the committee's view that—

> there should be no weakening of the Commission's announced goal of local service * * *. Unrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service—or being left, at best, with nothing more than a highly limited satellite service * * *. The undesirable economic, cultural, political, and social consequences of making Montana and northern Idaho tributary to Spokane, southern Idaho dependent upon Salt Lake City, and Wyoming and western Nebraska mere adjuncts to Denver should be so clear as to require no elaboration. There are similar possibilities with respect to other parts of the United States.[1]

The committee stressed particularly the need for protecting television stations in single-station markets from the impact of CATV operations.

In urging the adoption of legislation providing for the licensing of community antenna television systems, the committee emphasized:

> It must be clearly recognized that the operations of community antenna systems are so inter-

[1] S. Rept. 923, pp. 7-8.

twined with the rest of the television system and have such serious potential impact upon the other elements in the overall complex of television service that CATV competition does have an effect on the orderly development of television.[2]

The Senate considered the legislation and after lengthy debate by a vote of 39 to 38 (23 Senators not voting) voted to recommit the bill, S. 2653, to the Committee on Interstate and Foreign Commerce.

While the bills dealing with the CATV regulation were introduced during subsequent sessions until the 89th Congress no hearings were held on such bills either in the Senate or in the House of Representatives.

Committee Hearings and Consideration

The committee held 4 days of hearings in 1965 and 6 days of hearings in 1966 on the subject of CATV legislation and regulation. In the course of these hearings testimony was presented by the Government, broadcast, and CATV witnesses.

Subsequently, the committee conducted nine executive sessions to go over the testimony and legislative recommendations which were presented to the committee.

The committee knows of no legislation which has received more careful and minute study and deliberation than the instant legislation.

---

[2]Supra, p. 8.

Consent of Broadcast Stations to CATV Transmission of Broadcast Signals

The committee has considered the question raised by the Commission in its legislative recommendation of whether section 325 of the Communications Act should be amended so as to prohibit transmission by CATV systems of any broadcast signals except with the express authority of the broadcast stations. In view of the pendency of copyright legislation it is the view of the committee that the recognition and protection of any property rights in programs broadcast by radio and television stations should more appropriately be determined within the framework of copyright legislation rather than within the framework of communications legislation. Therefore, the committee decided against amending section 325 so as to require CATV systems to secure the consent of broadcast stations for the transmission of broadcast signals.

Conclusions

On the basis of the hearings and the executive sessions, your committee has reported an amended bill which it believes is in the public interest. Under the provisions of the bill, the Commission has broad authority to regulate CATV operations in a manner which will dovetail with achieving the dual purposes for which television plans have been developed by the Congress and the Commission—to give viewers access to multiple TV programs, and at the same time, to provide for the activation and continued operation of the largest possible number of local com-

mercial and educational television stations capable of serving community needs.

The achievement of these objectives requires a careful balancing of considerations in the promulgation of CATV rules and in their administration. Whether or not a local TV station actually serves community needs is a question of fact which will have to be determined by the Commission in individual cases whenever such cases arise.

It is the purpose of the legislation to serve the broad interests of the American people with regard to television broadcasting and not to protect one type of business activity from the competitive impact of another type of business activity.

It will be the task of the Commission in issuing rules and in adjudicating individual cases to determine what best meets the broad public interest with regard to television broadcasting and the instant legislation is intended to assure that the Commission has authority sufficiently broad properly to perform this difficult task.

AGENCY REPORTS

The report submitted by the Department of Justice may be found in appendix B.

No report was submitted by the Federal Communications Commission since the Commission requested introduction of this legislation. The Commission's explanation of the bill may be found in appendix A.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * * * * *

Title I—General Provisions

* * * * * * *

DEFINITIONS

Sec. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign [radio] transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting *or in operating a community antenna system* shall not, insofar as [such] *the* person is so engaged, be deemed a common carrier.

* * * * * * *

(ff) "Great Lakes Agreement" means the Agreement for the Promotion of Safety on the Great Lakes

by Means of Radio in force and the regulations referred to therein.

(gg) "Community antenna system" means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.

* * * * * * *

Title III—Provisions Relating To Radio

PART I—GENERAL PROVISIONS

* * * * * * *

PROHIBITION AGAINST SHIPMENT OF CERTAIN TELEVISION RECEIVERS

Sec. 330. (a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: *Provided,* That this section shall not apply to carriers transporting such apparatus without trading in it.

(b) For the purposes of this section and section 303(s)—

(1) The term "interstate commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof which is within the United

States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States, but does not include the Canal Zone.

COMMUNITY ANTENNA SYSTEMS

SEC. *331. (a) The Commission shall, as the public interest, convenience, or necessity requires, have authority—*

(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of

local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.

(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the

extent of direct conflict with the provisions of this Act or regulations promulgated under it.

For the convenience of Members of Congress the provisions of Public Law 87-331 are set out below:

AN ACT TO amend the antitrust laws to authorize leagues of professional football, baseball, basketball, and hockey teams to enter into certain television contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

SEC. 2. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

SEC. 3. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock post-meridian or on any Saturday during the period beginning on the Second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate football contest scheduled to be played on such a date if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, and

(2) such intercollegiate football contest and such game site were announced through publication in a daily newspaper of general circulation prior to March 1 of such year as being regularly scheduled for such day and place.

SEC. 4. Nothing contained in this Act shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1 of this Act shall apply.

SEC. 5. As used in this Act, "persons" means any individual, partnership, corporation, or un-

incorporated association or any combination or association thereof.

SEC. 6. Nothing in this Act shall affect any cause of action existing on the effective date hereof in respect to the organized professional team sports of baseball, football, basketball, or hockey.

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION'S EXPLANATION OF PROPOSED AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934, AS AMENDED, CONCERNING REGULATION OF COMMUNITY ANTENNA SYSTEMS

These proposals for amendments to the Communications Act are submitted pursuant to the Commission's determination, announced in its Public Notice of February 15, 1966, that it would make the following recommendations for legislation to the Congress:

(a) Clarification and confirmation of FCC jurisdiction over CATV systems generally, along with such specific provisions as are deemed appropriate.

(b) Prohibition of the origination of program or other material by a CATV system with such limitations or exceptions, if any, as are deemed appropriate.

(c) Consideration of whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system.

(d) Consideration of whether CATV systems should or should not be deemed public utilities.

In this connection, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.

The proposed new subsection 3(h) of the Communications Act broadly defines a "community antenna system" to include any facility which receives broadcast signals[1] over the air[2] and distributes them by means of wire or cable to subscribing members of the public. While the definition is all-inclusive, we believe it is unnecessary to impose regulations on all systems. Therefore the proposed new section 331(a)(2) would empower the Commission to exempt from regulation, by general rule, systems, which, because of their size or nature, need not be encompassed within the regulatory scheme. For example,

---

[1]Both radio and television signals are included. While we are aware of no community antenna system which now distributes only radio signals, some systems do distribute signals from both radio and television broadcast stations.

[2]This would include signals received directly off the air from a broadcast station, as well as those broadcast and then relayed by means of a microwave relay system.

the Commission's present regulations exempt systems serving fewer than fifty subscribers or which serve only one or more apartment houses under common ownership, control or management. See, e.g., 47 CFR 21.710(a).

Of prime importance is the proposed new section 331(a)(1) of the Act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a Congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries.

We recommend the broad approach along the lines of proposed section 331 (a)(1) because of the dynamic and relatively new nature of the CATV field. We believe that it would be difficult and indeed impracticable to attempt to delineate precisely in a statute all of the possible areas in which the public interest may in the future require Commission action. Had legislation been drawn to deal specifically with the problems posed by CATV in the fifties, it would have been inadequate as to such present problems as those raised by CATV entry into the major markets. Today, for example, because there is so little program origination or alternation or deletion of broadcast

signals being carried, there would appear to be few, if any, problems concerning the carriage over CATV systems of political broadcasts or of appropriate identification announcements with respect to sponsored material, including programs involving controversial issues. But their could be future problems in these respects, requiring regulation along the lines of sections 315 or 317. The broad regulatory approach we urge is similar to that adopted by the Congress for regulation of radio, and the following quotation from the landmark Supreme Court case construing the Communications Act is equally pertinent to the dynamic and new field of CATV:

> * * * Congress was acting in a field of regulation which was both new and dynamic * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved *(NBC v. U.S.,* 319 U.S. 190, 218-219).

There is one area which we believe that Congress may wish to consider specifically at this time, rather than leaving to subsequent regulatory decision under the proposed section 331(a)(1)—namely, whether community antenna systems should be required to obtain the consent of the originating broadcast station before retransmitting the station's signal over the system. It has been urged that such a requirement would obviate the need for much, if not all, of the Commission's present regulations in this field. The Commission is not now in a position to state whether a so-called section 325(a) approach would be effective or fully consistent with the public interest. The matter is one of such a nature that we believe it should be more appropriately considered by the Congress. In this way, there could be Congressional hearings on how such a retransmission consent provision would function as a practical matter, whether there should be special provisions for the CATV systems operating in a small community, and whether and to what extent there should be "grandfathering" of existing systems. The statute finally enacted could then reflect the Congressional judgment on this important aspect.

The proposed new section 331(b) of the Communications Act deals with the question of possible program origination by community antenna systems. We believe it would be inequitable to allow unlimited program origination since, this would permit community antenna systems to use the distribution of free television broadcast signals as a base for engaging in

pay-TV operations.[3] Moreover, the Commission, and indeed the Congress, has had a continuing concern with the possible impact of subscription television service on the free television broadcast service. The Commission currently has before it a petition requesting the institution of rule making proceedings to provide for subscription television service on a permanent and carefully regulated basis throughout the country utilizing the facilities of television broadcast stations. Because of the foregoing considerations, the proposed section 331(b) would bar any general pay-TV operation by a community antenna system.

While convinced that community antenna systems should not be permitted unlimited program origination, we are not recommending that Congress impose a complete ban on program origination. There would appear to be various possible exceptions (e.g., the fairly common time and weathercasting channels on CATV systems; see also par. 57 of our *Notice of Inquiry and Notice of Proposed Rule Making,* Docket No. 15971, 1 FCC 2d 453, 474-75). The scope of such possible exceptions to the ban could only be determined after appropriate proceedings. Because of the importance of the matter, we would suggest that Congress, upon the basis of its hearings, resolve this question and enact specific statutory guidelines.

---

[3]Specific charges to subscribers for programs originated by a community antenna system could, of course be barred, but it might be difficult to insure that monthly rates charged to subscribers were not being set at a level which would take into account programs originated by the system, particularly in the case of a new system.

Absent such Congressional guidelines, the Commission recommends that Congress follow the approach set out in the new section 331(b). The proposed section 331(b) in addition to barring program origination by community antenna systems, would permit the Commission to grant exceptions subject to several limitations. An express finding would have to be made, after appropriate proceedings, that an exception would serve the public interest; it could be granted only by general rule; and no additional charge to subscribers would be permitted under any exception granted.

Finally, the Commission believes that Congressional consideration should also be given to the appropriate relationship of federal to state-local jurisdiction over community antenna systems, particularly with regard to initial franchising, rate regulation and related matters. The Commission generally has not proposed to exercise any jurisdiction with respect to these matters. (See par. 32, *Notice of Inquiry* and *Notice of Proposed Rule Making,* Docket No. 15971, 1 FCC 2d 453, 466). Rather, it has recognized that many local governmental bodies, usually in connection with the grant of franchises, have asserted some jurisdiction with respect to rates charged subscribers and similar matters. At least three states (Connecticut, New Jersey, and Rhode Island) have held that CATV systems are public utilities.

In our opinion, the public interest will best be protected by permitting state and local regulation to continue with regard to those matters not regulated

by the Commission. We are therefore recommending legislation along the lines of the proposed section 331(c). That section provides that there would be no federal preemption except to the extent of direct conflict with the provisions of the Communications Act or regulations enacted by the Commission. This would permit state and local action, but would not foreclose federal action to carry out the purposes of the Act and to promote the "public interest in the larger and more effective use of radio" (sec. 303(g)), where such action becomes necessary.

Adopted March 2, 1966.

Attachments:

Dissenting statement of Commissioner Robert T. Bartley.

Separate statement of Commissioner Lee Loevinger.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that telling the public it cannot receive broadcasts it wants and is willing to pay for via CATV is unsound public policy.

People willing to pay extra should be allowed to bring in broadcasts which they would not otherwise receive as well or not at all.

Conditions which the Commission would impose on CATV as to carriage, non-duplication and procedural impediments to development in the top 100 markets appear to be for the economic protection of television

stations. Experience indicates that economic protection begets more regulation.

The heart of concern over CATV is its possible evolution into pay television. Fear has been expressed that the community antenna systems will be built and made viable by using free broadcasts from television stations; then, after the systems have acquired a sufficient number of subscribers, they could afford to originate their own programs, and pay television would result.

Consideration need be given to the existing types of systems, (1) community antenna systems which receive, and distribute to subscribers, transmissions of broadcast stations, and (2) closed-circuit systems which originate their own special programming and distribute it by wire or cable to theatres, business establishments or homes of subscribers.

I believe we should not discourage closed-circuit systems built and made viable by distributing their own programs.

It is the mixing of the two types of systems which would give rise to an unfair competitive advantage. It would be inequitable to allow program origination since this would permit community antenna systems to use the distribution of free television broadcast signals as a base for engaging in pay television operations.

Accordingly, at the present time, I would recommend the following legislation, limited to prohibiting program origination by community antenna systems:

Section 3(hh) [Definition]: Community antenna system means a facility which receives any programs transmitted by a broadcast station and distributes such programs by wire or cable to customers paying for the service.

Section 331: No community antenna system shall distribute programs other than those received from transmissions by broadcast stations.

Separate Statement of Commissioner Lee Loevinger Regarding Proposed CATV Legislation

I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATVs. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary.

In general I agree with the views expressed by Commissioner Bartley in his dissenting statement. However, those views are more relevant to consideration of the regulations that may be promulgated by the Commission under the proposed legislation than to the bill now proposed. The legislation proposed is basically a broad authorization to the FCC to act in this field, with a specific declaration that Congressional action shall not be construed as Federal preemption. It would be desirable for Congress to es-

tablish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish. Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the Congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.

APPENDIX B

Agency Reports

Department of Justice,

Washington, D.C., June 17, 1966.

Hon. Harley O. Staggers,

Chairman, Committe on Interstate and Foreign Commerce,

House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on H.R. 13286, a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with re-

spect to community antenna systems, and for other purposes.

The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service. The considerations which underlie the proposed legislation are described in detail in the Commission's report and order of March 8, 1966, in FCC docket Nos. 14895 and 15233, 31 F.R. 4539, March 17, 1966. The question of the Commission's present jurisdiction, as it applies to community antenna systems, is discussed beginning at 31 F.R. 4543.

The bill consists of three principal substantive provisions. First, it would specifically authorize the Commission to issue orders, make rules and regulations, and prescribe conditions and restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, with authority to exempt certain types of systems, in whole or in part, because of their size or nature. Second, it would bar program origination by such systems, but would permit the Commission to grant exceptions to the prohibition, where appropriate. Finally, it would preserve State and local jurisdiction over such systems "except to the extent of direct conflict with this Act or regulations promulgated hereunder."

Section 313 of the present act (48 Stat. 1087, 47 U.S.C. 313) declares the antitrust laws to be applicable to the manufacture and sale of radio apparatus and to "interstate or foreign radio communication." The bill does not propose to define the term "community antenna system" specifically in terms of radio communication. Although regulation of such systems by the Commission would not appear to confer antitrust immunity (see *United States v. Radio Corporation of America,* 358 U.S. 334 (1959)), the Department of Justice is of the view that it would be desirable to eliminate whatever doubt there may be with respect to systems which rely only upon cable transmission by adding a provision to the bill which would provide expressly that all community antenna systems are within the declaration of section 313.

Apparently through error, the last subsection added to the present section 3 of the act was designated subsection "(ee)" when it should have been "(gg)." The next subsection to be added, therefore, should be "(hh)," and the bill should be changed accordingly.

We generally favor the confirmation by Congress of the jurisdiction the FCC has recently asserted over community antenna systems in order that the Commission shall have adequate authority to integrate community antenna service into the national broadcast structure. We do not take any position on the questions of specific aspects of community antenna service regulation. The community antenna service industry is a rapidly expanding and ever-changing one having significant competitive implications, par-

ticularly with respect to television broadcasting, and the questions which may arise in the course of its future development cannot be foreseen with precision.

We think that the proposal to grant jurisdiction to the FCC constitutes a reasonable and correct approach to the community antenna service question. The bill's general grant of authority, unencumbered by attempts to deal by statute with specific details of regulation, would afford the FCC the latitude necessary to fashion rules adapted to conditions in a developing field. It is for this reason that we support the primary purpose of the legislation but express no view on the other questions as to which the FCC has asked for congressional guidance—questions involving broadcaster permission, pay-TV, program origination, and Federal-State-local jurisdiction.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK, *Deputy Attorney General.*

MINORITY VIEWS I ON H.R. 13286

H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to under-

write an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for

broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain

control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

In no community in the United States would the people have the freedom to receive over a CATV

system any local program of weather information, news, PTA meetings, town council meetings, civil defense or other emergency information, or any other matter not approved by the Federal Communications Commission in Washington, D.C. In other words, no program can be originated on a local CATV station, whether it be a high school football game or a meeting of the local school board, unless the Federal Communications Commission has granted authority for such program.

No "grandfather clause"

H.R. 13286 does not contain a "grandfather clause." It makes no difference how much money, how much time, or how much effort any individual, group, or community has invested in developing a CATV system—they must begin from scratch insofar as the Federal Communications Commission is concerned. This bill, if passed, wholly ignores any and all rights the CATV operator might have gained by virtue of the risk he has taken under the free enterprise system. The only thing he does not have to do that would be required of a new operator is to come to the Federal Communications with hat in hand and ask for a construction permit for existing facilities. In other words, he does not have to come in and ask for a construction permit for something that has already been constructed. His entire investment of money, time, and effort is at the whim and discretion of a Federal bureau insofar as its future operation is concerned, regardless of what has been his practice in the past or what rights might have accrued to him.

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate.

WALTER ROGERS.
J. ARTHUR YOUNGER.
J. OLIVA HUOT.
SAMUEL L. DEVINE.
FRED B. ROONEY.
TIM LEE CARTER.

MINORITY VIEWS II ON H.R. 13286

CATV which brings to the television viewer additional, clear pictures and programs has been very favorably received by the public. Where such systems are already in place, the customers are enthusiastic. Where they are in the process of being constructed, the prospective customers are anxious to obtain the service.

CATV systems are looked upon with mixed emotions. The broadcaster looks favorably upon a CATV system when it projects his signal into areas where it would otherwise be weak or nonexistent. The same broadcaster abhors CATV when it brings into his market expanded service in the form of additional, outside signals which the public in that area could in no other manner receive.

The Communications Act of 1934 was enacted, among others, to prevent overlapping and confusion in the use and allocation of the restricted number of electromagnetic frequencies for broadcasting. The Federal Communications Commission was created to make such allocations. This Commission throughout its history has clearly understood that it was not its place to insure the economic success of a broadcasting enterprise. Nor was it in anywise concerned with reception of signals from broadcast facilities.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact, it spe-

cifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5-to-2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground the Commission prepared and suggested a most peculiar piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be

reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This, of course, means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

In at least one other particular the bill and its language goes far beyond the range of authority given to regulatory bodies and probably creates a fatal flaw. Subsection (d) of section 331 purports to leave room for additional regulation of the CATV industry by the various States, but includes an exception which would nullify any such laws in direct conflict with "the provisions of this Act or the regulations promulgated under it." The result of such a provision is to make it possible for four individual Commissioners, a majority of the Federal Communications Commission, to issue a regulation, the effect of which would be to nullify State laws.

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation, and little purpose is served in passing such legislation at this time particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed.

We are, for these reasons, opposed to the passage of H.R. 13286.

James T. Broyhill.
James A. Mackay.

SEPARATE VIEWS OF CONGRESSMAN J. J. PICKLE,

JUNE 15, 1966

Most everyone will agree that the CATV system's arrival in the communications field was an unforeseen and unprovided for event in the laws regulating broadcasting in behalf of the general public. It is generally agreed that this arrival has developed into an extension of broadcasting which vitally affects the public interest.

I do agree with the general approach of this bill which is a grant of authority to the FCC over

the community antenna systems, which should be recognized as an extension of broadcasting. If the Congress is to meet its responsibility to the general public in this area, it should enact a more specific and well-defined piece of legislation spelling out the rules and regulations. I would like to make three specific recommendations:

1. It should be clearly stated that the community antenna systems should be able to go into areas not normally covered by broadcasters, and these areas should be defined as areas which are not within the general sphere of influence of the local station. This could be satisfactorily taken care of by defining a local station as one whose sphere of influence and protection extends a definite number of miles. For instance up to 45 miles—or to the grade A contour, as the FCC likes to describe. Extending this sphere all the way to the grade B contour (often as much as 70 miles) creates an unrealistic requirement for the community antenna systems.

2. This bill should also spell out clearly that the protection given by the FCC to stations in the top 100 markets, as determined by the ARB, be given to all stations regardless of size. As the FCC rules now stand, the large stations—or big cities—which don't need protection are getting it and the small stations —and small cities—which need it most are getting none at all. If the rules are good rules they ought to apply to all stations—across the board. To do otherwise, is discrimination, in reverse, and not fair at all.

3. We should be very careful not to allow any origination of program matter on community antenna systems unless it is clearly spelled out.

I submit that this Congress would enact a fairer and more reasonable piece of legislation if it would consider carefully these three possible amendments.

J. J. Pickle.